UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GMAC COMMERCIAL MORTGAGE CORPORATION,	)	
Plaintiff	)	
v.	)	***Docket No. 99-178-P-C***
PAMELA W. GLEICHMAN, et al.,	)	
Defendants	)	

MEMORANDUM DECISION DENYING ATTACHMENT

After notice to defendant Greyrock Tower LLC ("Greyrock") and hearing on affidavits, the court finds that the plaintiff has not established that it is entitled to an attachment pursuant to M. R. Civ. P. 4A. This finding is based on the affidavits of Steven Bechen, Exh. 1 to Motion for Approval of Writs of Attachment ("Motion") (Docket No. 3) and Docket No. 13; Richard P. Nelson, Jr. ("Nelson Aff.") (Docket No. 9); and Pamela W. Gleichman ("Gleichman Aff.") (Docket No. 8); the letter dated April 16, 1999 from GMAC Commercial Mortgage Corporation to Greyrock Tower LLC (the "loan commitment contract") (Exh. 2 to Motion); and the letter dated January 25, 1999 from GMAC Commercial Mortgage Corporation to Pamela Gleichman (the "term sheet") (Exh. 3 to Motion).

The plaintiff requests attachment in the amount of $1,674,000, comprising a "good faith deposit" in the amount of $369,000, a "loan origination/placement fee" in the amount of $984,000, a "construction inspection/management fee" in the amount of $246,000, and $75,000 in actual

expenses, all of which it contends are due under the terms of the loan commitment contract. Greyrock argues in response that it is excused from paying any of the amounts due under the loan commitment contract because closing on the loan that is the subject of that contract never took place, rendering the contract null and void by its own terms; that the plaintiff did not earn the "good faith deposit" because it was due on a date that is defined in the loan commitment contract with reference to the closing date, which never occurred; that the provision of a contract loan by the plaintiff was a condition precedent to its receipt of any of the amounts it claims in this action, and that because closing never took place no loan was provided; and that the $125,000 deposit paid under the terms of the term sheet by Landmark America, LLC, another defendant, is sufficient to reimburse the plaintiff for its actual costs.

The term sheet provides that the $125,000 deposit[1] paid by Landmark America, LLC will be returned to the borrower, a term defined as a "to be formed . . . entity," if "the Construction Loan is not approved in a form substantially similar to this preliminary letter of intent," less certain fees and costs. Term Sheet at [1], [3]. On the record before the court, it is impossible to determine whether a borrower entity was formed and, if so, who or what that entity is; by whom the construction loan was to be approved; or whether it was approved in a substantially similar form. Accordingly, I can only conclude, for all that appears in the record, that the construction loan was not so approved and that the term sheet deposit must be returned, "less the underwriting fee [$5,000], the non-refundable fee [$25,000] and all out-of-pocket costs incurred by [the plaintiff]." Term Sheet at [3]. The only evidence of out-of-pocket costs incurred by the plaintiff is the $75,000 it seeks to include in an

[1] Both the term sheet and the loan commitment contract refer to "good faith deposit[s]." In order to differentiate the two separate payments, I will refer to the "good faith deposit" paid pursuant to the term sheet as the "term sheet deposit."

attachment. Affidavit of Steven Bechen, Exh. A to Motion ("First Bechen Aff."), ¶ 26. These costs must be included in the out-of-pocket costs to be retained when the term sheet deposit is returned to the borrower. The plaintiff is not entitled to recover these costs twice.

Greyrock's opposition to the remaining fees claimed by the plaintiff is based on the following term of the loan commitment contract:

> The Closing shall occur on the date on which the Bonds are issued and delivered by the Issuer and purchased by the Underwriter or its customers. The Closing must occur on or before June 15, 1999 (the "Closing Deadline"). In the event that the Closing does not occur on or before the Closing Deadline, this Commitment shall expire and be null and void and of no further force and effect.

Loan Commitment Contract ¶ 8. The obligation to pay the good faith deposit arises on the Pricing Date, *i.e.*, "the date on which the Underwriter establishes the interest rate(s) to be borne by the Bonds, which date must be not more than thirty (30) days prior to the Closing nor less than seven (7) days prior to the Closing." *Id*. ¶ 3. The good faith deposit is "non-refundable in the event that the Closing does not occur on or before the Closing Deadline." *Id*. While the plaintiff apparently provided Greyrock with an established interest rate before Greyrock informed the plaintiff that it would not complete the loan transaction, First Bechen Aff. ¶¶ 18 (interest rate of 8% established on April 29, 1999), 22 (Gleichman informed Bechen on May 10, 1999 that Greyrock would not proceed); Gleichman Aff. ¶ 20 (Gleichman informed Bechen on May 6, 1999 that "the present project financing was not going to be possible"), the provision of an interest rate, standing alone, does not establish the Pricing Date, which by the terms of the loan commitment contract "must be not more" than 30 days before closing "nor less" than seven days before closing.

If a closing date had been established by agreement of the parties, that fact is not revealed

by the record before the court. Clearly, the interest rate establishment date of April 29, 1999 preceded the June 15, 1999 closing deadline by more than thirty days. Thus, on this record, it is impossible to tell whether the temporal limitations governing the establishment of the Pricing Date had been satisfied. Without this missing piece, the court cannot determine whether Greyrock's obligation to pay the good faith deposit had accrued. To the extent it might be argued that this provision of paragraph 3 of the loan commitment contract is susceptible of another interpretation — namely, that the Pricing Date is simply the date on which the underwriter sets the bond interest rate — then, at best, the provision reveals an ambiguity which, under Pennsylvania law,[2] is to be "construed most strongly against the party . . . who drafted it," *Poole v. Great Am. Ins. Co.*, 182 A.2d 509, 510 (Pa. 1962), in this case, the plaintiff, Nelson Aff. ¶ 22. Thus, under neither scenario can the plaintiff establish that it was entitled to the deposit at any particular time before the repudiation of the agreement by Greyrock.

The plaintiff contends that it is entitled to the deposit, the loan origination fee and the construction inspection fee under the loan commitment contract due to Greyrock's anticipatory repudiation of that contract. Pennsylvania law provides that a party is discharged from its duty to perform as soon as the prospective failure of the other party to a contract shows that substantial performance will not be achieved. *Jonnet Dev. Corp. v. Dietrich Indus., Inc.*, 463 A.2d 1026, 1031 (Pa. Super. 1983). Here, the loan origination and construction inspection fees are to be paid "as a condition of the Closing, at the Closing" "from the proceeds of the Loan." Loan Commitment Contract ¶ 11. While due at closing, which the anticipatory breach of Greyrock prevented from

[2] It is undisputed that Pennsylvania law applies to the interpretation of the contract. Loan Commitment Contract ¶ 17.

occurring, these fees are to be paid from the proceeds of the loan and, in the case of the construction inspection fee, for services that could only have been provided after the closing. No loan was made, so there are no proceeds; the plaintiff retains the use of its $42,200,000 as well as the $75,000 in actual costs that it has incurred. The loan commitment contract itself does not provide that the fees at issue will constitute liquidated damages in the event of breach.

While the plaintiff may be excused from performing under the loan commitment contract by Greyrock's anticipatory repudiation, it must still show what its damages from Greyrock's breach are, rather than merely insisting on contract performance. *See, e.g., Nikole, Inc. v. Klinger*, 603 A.2d 587, 594 (Pa. Super. 1992) (after repudiation, plaintiff may seek restitution or damages); *Rosenberg v. Rosenberg*, 469 A.2d 626, 630-31 (Pa.Super. 1983) (court may fashion equitable relief upon showing of anticipatory breach). The plaintiff has not done so here. Accordingly, it has not shown that it is more likely than not that it will recover the deposit, the loan origination fee and the construction inspection fee and is not entitled to an attachment including those amounts.

Therefore, for the foregoing reasons, the motion for attachment is **DENIED**.

Dated this 30th day of July, 1999.

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David M. Cohen
United States Magistrate Judge